115 of the Customs Ordinance, and indeed, on the facts of the case even without them the prosecution have made out a case against the accused which if unrebutted would warrant their conviction upon the offences with which they stand charged. I think therefore that the order of acquittal must be set aside and the matter sent back to the President with a direction that he should call upon the accused to make their defence.

The last ground of appeal was that the sentences of $5,000 or one year on the first charge and $3,200 or 8 months on the second charge are, in view of the fact that the 3rd accused had a previous conviction for a similar offence within a year, manifestly inadequate. On the question of sentence the learned President says:

"With regards to the sentences on the 1st and 2nd charges on accused No. 3 who had pleaded guilty, I would agree that he should have been dealt with more severely than the others as he appeared to be the leader. However, considering the submission that he was paid $100 to do the job and the mention of a certain Chinese 'Ah Kwai' by the first accused in his evidence who had approached him to hire the lorry, I believe that accused No. 3 was only an agent who had committed the offence on payment of the money. Under the circumstances I feel that the fines imposed were adequate punishment and a deterrent in view of the terms of imprisonment in default of payment of fines. I understand that the accused No. 3 is now serving his terms of imprisonment for failing to pay the fines."

This would indicate to me that the President clearly set his mind to the question of sentence and gives reasons for making no distinction between the 1st and 3rd accused. I do not think that the learned President has acted on wrong principles or that the sentence is so manifestly inadequate as to warrant the appellate court interfering with it, and that ground of appeal must be dismissed.

In conclusion I must pay tribute to the way Mr. Low Sang Chin, the Senior Customs Officer prosecuted this case before Tuan Syed Agil, the learned President of the Sessions Court. He has prosecuted with great fairness and with the ability which one always expects from the Customs Department. He had clearly taken the greatest trouble to assist in the administration of justice. He had done considerable research and was able to refer the learned Deputy to the Malacca case of *Yeo Chin Lee* to which I have referred. I also must pay tribute to the great trouble and care that the learned President has taken in his grounds of judgment. It is true that I am unable to agree with all his conclusions, but he may take comfort in the words of Thomson C.J. who, in the case of *Ng Kim Huat* v. *Public Prosecutor* [4] said:—

"The Customs Ordinance, 1952, is not very easy to understand. Many of its provisions are only comprehensible after reference to a long series of definitions, many of them very artificial, contained in the interpretation section and there are a number of 'reversal of onus' provisions which are sometimes not very easy to follow or to apply."

The order must therefore be that the appeal against the acquittal of the 2nd accused is dismissed, the appeal against the acquittal of the 1st and 3rd accused on the third charge without their defence being called must be allowed and the case remitted to the Sessions Court with a direction that they be called upon to enter upon their defence, and the appeal against the inadequacy of sentence imposed upon the 3rd accused must be dismissed.

Order accordingly.

Solicitors: *M. Ismail & Co.*

SHANMUGAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) August 11, 1962]

[Penang — Criminal Appeal No. 15 of 1962]

Criminal Procedure — Trial — Defence of alibi — Whether proof necessary to establish alibi.

Criminal Evidence — Character evidence — When admissible — Evidence Ordinance, 1950, ss.53 and 54.

Criminal Evidence — Witness — Evidence of, who did not go to police on own accord.

Penal Code, s.392 — Robbery.

Where the defence to a criminal charge is an *alibi* it is not necessary that the accused prove his *alibi* beyond reasonable doubt. All that he has to do is to cast a doubt upon the prosecution story. It is not necessary for this to be achieved that the evidence of the accused should be corroborated.

The law of evidence as to character in Malaya is different from that in England. The fact that an accused person has a bad character is irrelevant unless evidence has been given that he has a good character. Where an accused has not put his character in issue, but has merely attacked the character of the prosecutor in cross-examination, evidence cannot be called by the prosecution to prove that he is a man of bad character.

A witness should not be disbelieved, where the police have not asked him for a statement, just because he did not on his own accord go to the police and make a statement.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the appellant.

Wan Sulaiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hepworth J.: The appellant had been convicted in the Sessions Court, Penang, of the offence of robbery under section 392 of the Penal Code and had been sentenced to two years' imprisonment. From this conviction and sentence the appellant appealed.

There were eight grounds of appeal, three of which raised questions of law and the remainder questions of fact.

The defence was one of *alibi*. From his grounds of judgment the learned President appears to have considered that there was an onus on the appellant of proving his *alibi* beyond reasonable doubt. It was submitted on behalf of the appellant that this was a misdirection in law as all that the appellant had to do was to cast a doubt upon the prosecution story. With this submission I agreed.

It also appears from the learned President's grounds of judgment that he thought it was necessary for the evidence of the appellant as to his *alibi* to be corroborated by independent witnesses. Whereas corroboration would, of course, have strengthened the appellant's defence the appellant's statement on oath alone as to where he was at the time the alleged offence was committed was quite sufficient by itself, if he was to be believed. I therefore agreed with the submission on behalf of the appellant that this also was a misdirection in law.

During the cross-examination of the appellant questions were put to him designed to establish the fact that he had been summoned for assault on a previous occasion and that he was a man who assaulted women in public places. These questions were directed against the character of the appellant and were presumably allowed because counsel appearing on behalf of the appellant had cross-examined some of the prosecution witnesses as to their characters. It was submitted on behalf of the appellant that this evidence was irrelevant, prejudicial and inadmissible. With this submission I agreed. The law of evidence as to character in this country is different from that in England. The law here is contained in sections 53 and 54 of the Evidence Ordinance, 1950, and the effect of it is that the fact that an accused person has a bad character is irrelevant unless evidence has been given that he has a good character. Where an accused has not put his character in issue, but has merely attacked the character of the prosecutor in cross-examination, evidence cannot be called by the prosecution to prove that he is a man of bad character (*Sarkar* on Evidence, 10th Edition, page 502). As the appellant had not put his character in issue these questions were irrelevant and were gravely prejudicial to the appellant.

With regard to the facts this was essentially a case where seeing and hearing the witnesses in the witness box was a matter of paramount importance. I do not, therefore, propose to comment upon the grounds of appeal raised on questions of fact, except to say two things. Firstly, a witness should not be disbelieved, where the Police have not asked him for a statement, just because he did not on his own go to the Police and make a statement. The learned President appears to have considered that D.W.5 was not worthy of credit for this reason. Secondly, although it may be that the events took place exactly as described by the prosecution witnesses the prosecution story was nonetheless inherently improbable. In particular the fact that the appellant was well known to the complainant (who had been his mistress) and that, although he was supposed to have put the jewellery into his pocket, upon a search being made a short time afterwards no jewellery was ever discovered on his person or in his house. The learned President does not appear to have given any consideration to the improbabilities in the prosecution story.

In view of the fact that the learned President had misdirected himself in law as to the onus of proof on the appellant in his defence of *alibi* and as to the evidence required to support such a defence, it was not possible for me to say what the effect would have been on the learned President's mind, and consequently on his decision, if he had correctly directed himself in law on these matters. Accordingly I considered that this was a case in which the appeal should be allowed, the conviction and sentence quashed and a retrial ordered.

Retrial ordered.

Solicitors: *Lim, Lim & Oon.*

TAN ENG POH v. REGINA

[A. Cr. J. (Rose C.J.) August 22, 1962]

[Singapore — Magistrate's Appeal No. 88 of 1962]

Criminal Procedure — Sentence — Conviction on alternative charge under Criminal Procedure Code (Cap. 132), s.258 — Consideration of maximum sentences of both offences — Whether proper.

The appellant was charged with stealing a car or in the alternative with receiving a car knowing it to have been stolen. He was convicted in the alternative under section 258 of the Criminal Procedure Code. In passing sentence the learned District Judge considered the sentences that could be imposed on both offences. It was argued on appeal that the learned District Judge should not have done so and that he should have only considered the sentence for the lesser offence as provided by the abovementioned section.

Held: the reasonable inference that could be drawn from the judgment of the learned District Judge was that he passed sentence by taking into consideration the alternative sentences for both offences. This was not the proper test and the sentence should be reduced.

MAGISTRATE'S CRIMINAL APPEAL.

David Marshall for the appellant.

Sachi Saurajen (Deputy Public Prosecutor) for the respondent.

Rose C.J. (delivering oral judgment): This appeal which is only against sentence raises an interesting little point. The appellant was charged apparently with stealing a car or in the alternative with receiving a car knowing it to have been stolen.

The case was contested in the Court below and there is no appeal against the conviction. The learned District Judge sentenced him in the alternative under section 258 of the Criminal Procedure Code, which he is entitled to do.

The point that arises is whether the learned District Judge had in his mind the concluding part of section 258 which provides that if an accused is convicted in the alternative then the relevant punishment is that applying to the smaller of two offences, that is the offence which carries the lower penalty.

Well now, the learned District Judge says quite properly that the theft of a motor car is a serious offence and is punishable under either of